Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1310.

THOMAS L. HOUCHINS,
PETITIONER,

v.

KQED, INC., ET AL.,
RESPONDENTS.

Brief in Opposition to Petition for Certiorari.

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Question Presented.

After a full evidentiary hearing, the district court granted a preliminary injunction enjoining the petitioner Sheriff from excluding respondent KQED from the Alameda County jail, for the purpose of reporting on newsworthy events there, except when exclusion is justified by jail security. Before this suit was filed, petitioner completely excluded both press and public. After suit was filed, petitioner began providing limited guided tours for the public, and the press was allowed to join the tours. The district court found that restriction to these tours unreasonably limited KQED's ability to gather and disseminate information to the public. The court also found that reasonable access by the press would not result in

harm to petitioner's interests. The question presented is whether, in these circumstances, the district court abused its discretion in granting the preliminary injunction.

Statement of the Case.

A. Proceedings in the Courts Below.

Respondents (plaintiffs in the district court) are KQED, Inc. and the Alameda and the Oakland branches of the NAACP. KQED is a non-profit corporation engaged in educational television and radio broadcasting. Publicly-supported, KQED serves the counties in the San Francisco Bay Area. It maintains a daily television news program on Channel 9, entitled "Newsroom." The members of the NAACP plaintiffs reside in Alameda County, California.

Petitioner Thomas L. Houchins is the Sheriff of Alameda County and operates the county jail. This action was filed because the Sheriff excluded KQED, as a matter of a general policy of press exclusion, from covering newsworthy events and questionable conditions at the jail.[1] Respondents moved for a preliminary injunction, seeking to obtain reasonable access to the jail. Numerous affidavits were submitted with the motion, including the affidavit of the Sheriff of San Francisco County and several experienced news reporters. The district court also held an evidentiary hearing, where Sheriff Houchins and one of his lieutenants testified. Respondents presented the testimony of the Sheriff of San Francisco, an official from San Quentin State Prison and three television news reporters,

[1] In *Brenneman* v. *Madigan*, 343 F. Supp. 128, 132-33 (N.D. Cal. 1972), the court found conditions at the jail to be "shocking and debasing," violating "basic standards of human decency," so "truly deplorable" as to constitute cruel and unusual punishment.

to the general effect that press access is freely and routinely provided in other jails and prisons in the area and that this created no problems whatever for the institutions.

On November 20, 1975, the district court granted preliminary injunctive relief, providing for reasonable access by KQED to the jail. The specific methods of implementing such access were left to the Sheriff. The Sheriff then sought and was granted a stay of the order for two weeks, to enable him to develop procedures for press access — e.g., searches of reporters and their equipment, proper identification of press representatives, instructions as to matters that could not be photographed, consent forms for interviews, etc. But instead of implementing any such procedures, the Sheriff filed notice of appeal and obtained a stay from two judges of the Ninth Circuit. The appeal was then expedited.

On November 1, 1976, the Court of Appeals unanimously affirmed the preliminary injunction issued by the district court. On December 22, 1976, the court below denied the Sheriff's petition for rehearing. No member of the entire Ninth Circuit voted to rehear the case en banc. The Court of Appeals also denied a stay pending application for a writ of certiorari, but a stay was granted by Mr. Justice Rehnquist on January 28, 1977.

B. Statement of Facts.

1. *Events leading to this suit.*

KQED's Newsroom has for many years reported regularly on newsworthy events at prisons and jails in the San Francisco Bay Area. A large number of stories have been covered on the premises of the institutions, with film, video or still camera. Included have been stories from the San Francisco, Contra Costa, San Mateo

and Santa Clara County jails and San Quentin and Soledad prisons. None of this news gathering activity has ever resulted in any jail disruption or danger of any kind.[2]

In March, 1975, KQED's Newsroom reported on a suicide of a prisoner at the Alameda County jail. KQED also reported statements by a jail psychiatrist that conditions at the facility were partly responsible for the prisoners' emotional problems. The psychiatrist was fired after he appeared on Newsroom.

In connection with this developing news story, a KQED reporter telephoned petitioner Houchins and requested permission to see the jail facility and take pictures there. The Sheriff refused, stating only that it was his "policy" not to permit any press access to the jail. This was also his response to another television reporter who sought to cover stories of alleged gang rapes and poor conditions at the jail.

Prior to the filing of this suit, the Alameda County jail was completely closed to the press even though the Sheriff had never even heard of any disruption in any jail or prison, anywhere, because of news media access.

2. *The guided tours.*

After this suit was filed, petitioner initiated a series of guided tours for the public. Each tour was limited to 25 persons. The tours were booked on a first come-first served basis. Representatives of the press were permitted to go on the tours if they signed up in time. All six tours for 1975 were completely booked within a week after they were announced in July. Thus, any reporter

[2] In covering stories on location in jails and prisons, KQED recognizes that inmates are entitled to privacy, and this is respected. As a matter of policy, KQED does not photograph or interview inmates without their consent. When appropriate or required, KQED obtains formal written consents.

who did not instantly sign up for a tour weeks or months in advance was completely barred from the jail for the balance of the year.

The guided tours took the tourists through most but not all of the jail facilities. Excluded was the notorious "Little Greystone," the scene of alleged beatings, rapes and poor conditions. Also excluded were the "disciplinary cells" in the Greystone facility.

At the outset of each tour, the officials laid down the ground rules for the tourists. It was forbidden to speak with any inmates who might be encountered. No photographs were permitted. The Sheriff offered a series of 20 photographs for sale to the tourists, at $2 each or $40 for the set. None of the photos showed inmate life; they depicted only selected portions of the plant and equipment.

The evidence before the district court demonstrated several ways in which restriction to the tours unreasonably limited KQED's ability to gather and disseminate information to the public:

(a) The tours were completely guided and were accompanied by several guards. The tourists were of course shown only what the guards allowed them to see.

(b) Because the tourists were forbidden to speak with any inmate, they could hear only what the officials told them and got only "one side of the story."

(c) The Sheriff testified that inmates must be kept "from sight and communication with the tour group." Thus, the tourists never saw normal living conditions at the jail.

(d) Reporters were not permitted to take cameras with them. The sterile and unrealistic photos proffered for

sale by petitioner gave only an artificial idea of the reality of jail life.

(e) Finally, offering only a periodic tour made it impossible for the press to cover a specific event or follow a developing news story. News events are evanescent. They do not coincide with the Sheriff's schedule of tours. Limitation to a scheduled tour made it impossible to cover an escape, a fire, a suicide or other newsworthy event as it happened.[3] It also made it possible for the jail to be "scrubbed up" specially for the tour, as was done for a press tour in the past.

3. *Press access to other jails and prisons.*

The evidence before the district court showed that other jails and prisons have no limitations of the kind imposed by petitioner Houchins, that they routinely provide free press access and that such access creates no problems whatever:

a. *San Francisco County.*

The Sheriff of San Francisco operates four jails. He routinely authorizes reporters to enter and cover stories in his jails. The reporters are permitted to bring cameras

[3] The Sheriff's petition for certiorari (p. 9) asserts that reporters may "now" have access to cover "special events, such as fires or escapes." Nothing in the record supports this assertion. If the assertion is true, it raises a question of what the Sheriff considers a "special event" and whether his practice "operates in a neutral fashion, without regard to the content of the expression." *Pell* v. *Procunier*, 417 U.S. 817, 828 (1974). For example, information about a recent riot at the jail did not leak out to the public until nearly two weeks after the event. See the Appendix to this Brief. If in fact access for spot news events does not depend on the content of the news, this should be brought to the attention of the trial court before final judgment, not asserted without record support to this Court.

and tape recorders with them. The Sheriff also permits interviews of both inmates and staff. Never, on any occasion, has this created any security problems or any disruptions.[4]

Further, the San Francisco Sheriff advanced affirmative reasons, from the point of view of a correctional administrator, for admitting the press to the jails. He testified that jails "routinely end up being places that are extraordinarily and most unnecessarily abusive to people" and that media exposure of conditions serves to enhance public awareness and thus motivate county government to provide adequate funds for more decent facilities.

b. *Other County jails.*

The evidence showed that KQED and other stations have done stories on the premises of several other county jails, without any difficulties or disruptions of any kind.

c. *San Quentin.*

San Quentin's Public Information Officer testified about the press policy of the California Department of Corrections as implemented at San Quentin. The Department recognizes a citizen's "right to know," and provides for completely open media access to the prisons, with reporters allowed to bring cameras and tape recorders, to view all areas of the prison, to talk with prisoners generally and to interview prisoners of their choice.

The official testified that arrangements for the press to come to the institution are very simple, and can be made

[4] There is no record support whatever for the petitioner's assertion that the Ninth Circuit's decision will have "national impact" because jailers everywhere will be required "to do more" and that this will be a "burden" for them. To the contrary, the only evidence of practices in other jails is that press access is freely allowed and that this creates no problems for the jailers.

the same day of the request. San Quentin has experienced no disruptions or security problems whatever because of press access. The press could of course be excluded by the warden if any security problem developed.[5]

d. *National policy*

The district court received in evidence the relevant standards promulgated by the National Advisory Commission on Criminal Justice Standards and Goals. The Commission was appointed by the LEAA to formulate standards for institutions benefitting from LEAA grants. Petitioner Houchins has received funds from LEAA, including a grant for the reconstruction of the jail, but he does not comply with the standards. Standard 2.17 flatly provides that:

> "Representatives of the media should be allowed access to all correctional facilities for reporting items of public interest consistent with the preservation of offenders' privacy."

Current Federal Bureau of Prisons policy is expressed in the Policy Statement that the Ninth Circuit appended to its opinion in this case. The Bureau encourages news media access to all prisons "to insure a better informed public." Reporters may freely use cameras, bring tape recorders, conduct interviews, etc.[6]

[5] In addition to providing open news media access, San Quentin has frequent tours for the general public, during which inmates are regularly encountered. The record here shows that the California authorities have completely abandoned the press restriction they so vigorously and successfully defended in *Pell* v. *Procunier*, 417 U.S. 817 (1974).

[6] As the Policy Statement indicates, the Bureau has completely abandoned the press restriction it so vigorously and successfully defended in *Saxbe* v. *Washington Post*, 417 U.S. 848 (1974).

4. *Experience of other news reporters.*

The evidence before the district court also included unsuccessful attempts by other news reporters to cover stories at the Alameda County jail. One wished to gain access to the jail to cover stories of reported gang rapes and suicide. He spoke personally with Sheriff Houchins, who excluded him from the jail, stating only that it was his "policy" not to allow any press entry. The reporter also tried to get on the first guided tour of the jail in July, 1975. He promptly signed up but was removed from the list when someone in the Sheriff's office decided that more members of the public and fewer members of the press would be permitted to go.

Reasons Why Certiorari Should Not Be Granted.

I. The Court should Not Exercise Its Certiorari Jurisdiction to Review an Entirely Reasonable Preliminary Injunction Granted in the Exercise of the Trial Court's Discretion.

Finding that the requirements for a preliminary injunction were met, the district court granted an order that was carefully tailored to protect the legitimate interests of all parties. The order preliminarily enjoined the Sheriff from excluding the press "as a matter of general policy." The order directed that reporters be given access "at reasonable times and hours" for the purpose of providing full and accurate news coverage of jail conditions. But, deferring to the Sheriff's administrative discretion, the court provided that "the specific methods of implementing" press access were to be "determined by Sheriff Houchins." Further, the order expressly stated that the Sheriff may "in his discretion" exclude all news

access "when tensions in the jail make such media access dangerous."

In short, the order is a model of restraint. It does not grant the press total and instant access on demand. Rather, the Sheriff may make reasonable time, place and manner restrictions and may even, in his discretion, deny all access when he believes that jail tensions would make access dangerous. Moreover, the district court's direction that "the specific methods of implementing" access are left to the Sheriff permits petitioner to deal with any actual administrative problem. The district court granted the Sheriff a temporary stay based on his representation that specific procedures would be developed to cover such matters as searches of reporters and their equipment, proper identification of press representatives, instructions as to items that could not be photographed, consent forms for interviews, etc.

The Ninth Circuit unanimously upheld this preliminary order. A preliminary injunction is of course a matter of the trial court's discretion.[7] The Sheriff has presented no reason why this Court should disturb the considered exercise of discretion by the courts below.

The preliminary injunction was based on a finding by the district court that respondents — the station and members of the public — would suffer irreparable injury if preliminary relief were not granted and that the Sheriff had failed to show that such relief would result in harm to his interests. The most important factor, of course,

[7] See, e.g., *Deckert* v. *Independent Shares Corp.*, 311 U.S. 282, 290 (1940); *Anheuser-Busch, Inc.* v. *Teamsters Local No. 633*, 511 F. 2d 1097 (1st Cir.), *cert. denied* 423 U.S. 875 (1975); *K-2 Ski Co.* v. *Head Ski Co.*, 467 F. 2d 1087 (9th Cir. 1972); 11 Wright & Miller, *Federal Practice and Procedure*, Civil, § 2948 (1973).

is the irreparable injury suffered by the exclusion of KQED from covering news stories at the jail.[8]

A further reason for not disturbing the trial court's preliminary order is that it provides an excellent opportunity for definitively resolving all problems relating to press access before this litigation goes to final judgment.[9] Thus, we believe that implementation of the reasonable access provided by the district court's order will demonstrate even to the Sheriff that his opposition is not well-founded. He may then decide voluntarily to change his policy. During the litigation he may also adjust the procedural details of access. Conversely, if actual problems are encountered by the Sheriff during the pendency of this case, that would be a reason for the district court to deny or limit permanent relief.

[8] Mr. Justice Blackmun has reasoned, in considering a restriction on reporting by the news media, that First Amendment interests are infringed each day the restriction continues:

> "The suppressed information grows older. Other events crowd upon it. To this extent, any First Amendment infringement that occurs with each passing day is irreparable." *Nebraska Press Ass'n* v. *Stuart*, 423 U.S. 1327, 1329 (1975). Cf. *Procunier* v. *Martinez*, 416 U.S. 396, 404 (1974) (judicial abstention imposes "high cost" when First Amendment interests at stake).

[9] Contrary to Mr. Justice Rehnquist's observation on the stay application that the order did not appear to be "preliminary" to further proceedings that might modify the injunction, there are indeed substantial matters that must be resolved in the trial court before any final judgment is entered. For example, as mentioned in note 3, *supra*, the question of access for spot news coverage must be examined to determine whether censorship of content must be enjoined. Further, as suggested by the Ninth Circuit, "to determine the questions of infringement of the correlative rights of the public and the media and the means by which these rights are to be implemented," the trial court should consider in detail how access is handled in other prisons.

In sum, this is not the occasion for plenary review by this Court. Any such review should await a final judgment and a complete record.

II. The Preliminary Order is Not Inconsistent with Pell v. Procunier and Saxbe v. Washington Post.

The Sheriff's basis for seeking certiorari is his contention that the injunction is in conflict with *Pell* v. *Procunier,* 417 U.S. 817, 834 (1974) and *Saxbe* v. *Washington Post*, 417 U.S. 848 (1974). He argues that, so long as he mechanistically equates KQED's rights with those of the public in general — wholly excluding both or limiting both to guided tours — *Pell* and *Saxbe* provide him with a complete defense. This wooden argument was properly rejected by the lower courts.

The *sole* restriction on press access upheld by *Pell* and *Saxbe* was a prison rule against interviewing inmates specifically singled out by the press. The Court upheld this limited restriction because there was evidence in both cases that the restriction was necessary to avoid security problems caused by undue attention to "big wheels" who gained notoriety and influence over other prisoners. However, *Pell* and *Saxbe* did *not* authorize any press restrictions like those maintained by the Sheriff here. Indeed, the Court expressly pointed out in *Pell* that "*both the press and the general public are accorded full opportunities to observe prison conditions.*" 417 U.S. at 830 (emphasis added). Thus, in *Pell* the Court noted that "newsmen are permitted to visit both the maximum and minimum security sections of the institutions and to stop and speak about any subject to any inmates whom they might encounter." 417 U.S. at 830. In addition to tours,

newsmen were permitted "to enter the prisons to interview" randomly selected inmates. The same was true in *Saxbe.* There, the Court noted that "members of the press are accorded substantial access to the federal prisons in order to observe and report the conditions they find there." 417 U.S. at 847. In addition, newsmen were permitted to tour *and photograph* any prison facilities *and interview* inmates they encountered. *Id.* at 847, n.5.

Thus, the *only* restriction upheld by *Pell* and *Saxbe* was the rule against the press singling out specific inmates for interviews, and this narrow rule was upheld only on a record showing that the press in fact had substantial access to the prisons. As the district court noted in the present case, the press access actually permitted by the institutions in *Pell* and *Saxbe* is *precisely the access sought by KQED.* Absent a showing that such access would interfere with a valid correctional interest, the courts below properly found that *Pell* and *Saxbe* do not preclude relief here.

The trial court found that the Sheriff's policy disables KQED from gathering nonconfidential information on matters of public interest. The court also found that reasonable access to the jail would not endanger security or result in any harm to petitioner's legitimate interests. Since the Sheriff's restrictions were found to be "greater than is necessary or essential to the protection of the particular governmental interest involved," the preliminary order was entirely appropriate. See *Procunier* v. *Martinez,* 416 U.S. 396, 419 (1974); *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968).

Conclusion.

For the reasons stated, the petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX

San Francisco Examiner

112th Year No. 216 ☆ 777-2424 WEDNESDAY, FEBRUARY 16, 1977 Daily 20c CITY EDITION

Riot at Santa Rita: 26 women locked up

Battle blamed on 'hardcore troublemakers'

By Don Martinez

Twenty-six women are in Santa Rita Prison's maximum security Greystone section as a result of a disturbance Feb. 6. Details were learned only today.

Lt. George Vien, night commander at the Alameda County facility, said all privileges for Santa Rita's 140 women were still revoked as a result of the melee.

"They're going to have to earn back the privileges," Vien said.

He said the privileges included commissary, movies, visiting and television.

Vien said the women in Greystone are hardcore troublemakers and are being housed in what usually is the men's section. Board partitions and a 24-hour security watch by a squad of matrons, isolate the women from male prisoners, he said.

Vien said the women in Greystone include both sentenced and unsentenced prisoners. Their offenses include armed robbery, assault with a deadly weapon, heroin possession and possession of heroin for sale, auto theft and burglary.

The uprising a week ago Sunday caused $1,000 in damage and involved 53 women and a number of jailers. It was sparked when an inmate and a deputy started arguing in the mess hall.

Sprinklers were ripped from the ceilings, door panels kicked out and lockers overturned.

"We originally moved all 53 to Greystone where they were locked in a dayroom," he said. "Since then, those prisoners who felt ready to return to their regular quarters have been screened and put back in their regular cells."

Despite a few skirmishes, the situation is pretty much normal, Vien said, and male prisoners are helping to keep the situation cool by yelling "shut up" when the women make noise.